

1 THE COURT: Go ahead.

2 MR. SMITH (TELEPHONIC): It says, quote, "Request
3 for compensation for services of professionals whose time is
4 de minimis raise their red flag in our review other than
5 professionals with exceptional expertise. The fleeting
6 involvement of bankruptcy attorneys in a case often results
7 from a staffing inefficiency. Given the itinerate attorney's
8 lack of knowledge of the case, the attorney's time may be
9 less productive than attorneys regularly assigned to the
10 case. When this occurs we would expect an appropriate
11 deduction be made to the time charged." End quote, Your
12 Honor. Now I also want to point out a few things, Your
13 Honor, regarding the time of the -- for lack of a better word
14 well call them itinerate attorneys. Yes, we just went
15 through a response to Exhibit 6, and as of the time of those
16 with less than ten hours, I think the point was asserted that
17 these were people with special expertise outside the
18 bankruptcy arena. If I'm misquoting, I'd like to be
19 corrected on that. But in viewing the response to Exhibit 6,
20 we do see on the first page of that, of course, Mr. Austin's
21 time there and we're having no dispute with the 2,587 hours
22 that he put in and it shows that he's a partner and the
23 department is corporate bankruptcy. On the very next page,
24 though, of response to Exhibit 6, there's two attorneys,
25 Thomas P. Brennan (phonetical), also in the Corporate

1 Bankruptcy Department. He bills one hour to the case at an
2 hourly rate of \$540 an hour. Also on that same page, the
3 second page of the response to Exhibit 6, the attorney
4 Catherine A. Trackler (phonetical), she's also in the
5 Corporate Bankruptcy Department, and she billed 3.3 hours and
6 that was for a total of \$1,633.50. Your Honor, I think the
7 point made in Jasava is that back to when the Bankruptcy Code
8 was enacted in 1979, there was legislative history to the
9 fact that bankruptcy to entice all these professionals to
10 practice bankruptcy law and bankruptcy attorneys should be
11 paid the same inside bankruptcy as the attorneys outside
12 bankruptcy. But I think there's also a -- basically there's
13 a -- accordingly the billing practices should be the same,
14 and outside bankruptcy there are often billing reductions and
15 discretionary reductions that are taken by attorneys for
16 private clients. Many times, such reductions are for
17 attorneys who bill just small matters on this case. In our
18 fee audit experience, many law firms make this reduction
19 voluntarily. Paul Hastings has not made such a reduction.
20 Again, we think that there is good authority for such a
21 reduction. We think such a reduction is appropriate in this
22 case, and that's why we made that recommendation.

23 THE COURT: All right, thank you, Mr. Smith, I'll
24 take those comments under advisement. Can we have counsel
25 for Magten to approach the podium and you may address your

1 objections to the fees.

2 MR. AMEANI: Good morning, Your Honor. Dijon
3 Ameani, Schorch, Ameani, and Monvease (all phonetical) for
4 Magten Asset Management. I'm here, Your Honor, to present
5 Magten's objection to Paul Hastings final fee application.
6 We have basically two principal objections. The first, as we
7 discussed with Your Honor in our call on Friday, was that we
8 believe that this application should be deferred pending the
9 determination by the District Court of Magten's appeal
10 relating to Paul Hastings' disqualification and whether they
11 should have been disqualified in this matter. The second
12 objection goes to the representation that Paul Hastings made
13 to this Court previously to Judge Case in connection with
14 that disqualification motion, and as they went forward, how
15 their actions conflicted with that representation, in
16 particular in remaining involved in matters that they told
17 the Court that they would no longer be involved in. Before I
18 get to those two things, I wanted to address a couple of
19 things that Mr. Austin said, and that first one was the
20 scatter-gun approach that he likes to quote about Magten's
21 approach. Nothing could be further from the truth about
22 Magten's approach to this case. It's been a very focused
23 approach, Your Honor. It is focused on one transaction in
24 particular and that is what people refer to as the going-flat
25 transaction. We refer to it as a fraudulent transfer

1 transaction, but it involves, as Your Honor probably is fully
2 aware by this point, the transfer of significant assets from
3 Clark Fork to Northwestern just prior to the filing of this
4 bankruptcy and which I think no one disputes any longer that
5 that transfer was for anything but adequate consideration,
6 that in that transfer Northwestern benefitted to the tune of
7 hundreds of millions of dollars more than it relinquished in
8 return. All of Magten's actions in this bankruptcy have been
9 focused on trying to get the right result for the creditors
10 of Clark Fork who were disenfranchised by that transfer, and
11 it was in the process of doing that that Paul Hastings'
12 conflicts arose. It was in the process of focusing on that
13 aspect of the case that it became clear, although not crystal
14 clear until Mr. Austin submitted an affidavit, I believe, in
15 July 2004, that Paul Hastings had been involved in that
16 transaction and had been involved in that transaction for
17 both parties, both for Clark Fork and for Northwestern. And
18 a little bit of the history since -- and you'll indulge me
19 for a moment, Your Honor, if you will -- a little bit of the
20 history since Judge Case was involved previously on how that
21 came about, how that discovery of that came about. It was
22 during the course of negotiations in trying to determine how
23 things would be divided in this bankruptcy that there were
24 indications that Paul Hastings may have been on both sides of
25 that transaction, although that wasn't clear from the

1 records. Despite having put in several affidavits to the
2 Court, Paul Hastings had never disclosed that it had been
3 involved in both sides of that transaction. In March of
4 2004, my firm, on behalf of Magten, began making demands upon
5 Paul Hastings and asking them point blank, Were you involved
6 in both sides of the transaction? We'd like to know that.
7 And they avoided responding to that and forced us to
8 initially file a 328(c) statement with the Court, and
9 subsequently a disqualification motion following which, even
10 in response to that in affidavits, they did not disclose the
11 dual role that they played in that transaction. They only
12 finally disclosed it in response to an order from Judge Case
13 that they -- or direction, is probably closer to what it was,
14 a direction that they should file an affidavit disclosing
15 what their role was in that transaction, which they did in
16 July of 2004. It's noteworthy that in Judge Case's opinion
17 on the disqualification even though he denied our motion, he
18 did note that Paul Hastings should have made that disclosure
19 at the time, and that it was improper for them not to have
20 done so. He absolved them only on a basis of whether they
21 had an intention to withhold that information and only on the
22 basis of a last minute in-court declaration by the U.S.
23 Trustee's Office that they had in fact been advised of that
24 fact at the beginning of the bankruptcy and had chosen, I
25 guess, to keep it to themselves. On that basis he found that

1 it was not intentional, their nondisclosure. He then held
2 that effectively Magten didn't have the standing to challenge
3 the conflict because Magten was not a creditor of Clark Fork.
4 And also found that the two parties to the transaction has
5 consented to that transaction, which it turned out
6 subsequently was a misstatement on the part of Paul Hastings
7 as well. Clark Fork could never have consented to the dual
8 role of Paul Hastings in that transaction, at least there's
9 no record that they had done so. But based on that finding,
10 Judge Case held that Magten should not be disqualified.
11 Nevertheless, in response to that motion, Paul Hastings
12 stated that in order to avoid any potential or appearance of
13 any conflict of interest it would withdraw from all -- it was
14 withdrawing or it had withdrawn from all matters related to
15 the Magten adversary proceeding which is addressed to that
16 very transaction, what is called -- referred to generally as
17 the going-flat transaction. We believe that this final fee
18 application should be deferred pending the outcome of the
19 appeal from the disqualification order. We believe that we
20 have substantial grounds for that appeal, and if that appeal
21 were to be granted, then the tenure of how the Court would
22 deal with the fee application would be different. We also
23 believe that in light of the representation that they made,
24 that Paul Hastings made, this fee application should be taken
25 -- a much closer look should be taken of this fee application

1 and Paul Hastings should be directed to go back and review
2 its own files to determine to what degree it continued to
3 work on matters related to the adversary proceeding. And in
4 that respect, I think, Your Honor has a lot of experience
5 because if you look at what Paul Hastings has done since the
6 disqualification motion, since they represented that they
7 were getting out, they proposed a plan. They confirmed a
8 plan, and in the process of that plan proposal and
9 confirmation, they took issue again with the going-flat
10 transaction and Magten's objections to the going-flat
11 transactions, and those have been the subject of further
12 proceedings before Your Honor, which Your Honor is fully
13 aware of. They subsequently settled the case with Magten,
14 and they entered into the settlement with Magten and again,
15 the settlement was directed principally to the Magten
16 adversary proceeding and all matters related to it. They
17 then repudiated that settlement. All right? They then
18 suggested to us that we go to mediation, not the mediation
19 that's currently scheduled or that was directed by the Court
20 under the Court's rules with respect to any particular
21 appeal, but they actually suggested that we go to a mediator
22 whom they selected. A \$10,000 a day, we call him a holistic
23 mediator, out in Hawaii, Your Honor. They came to us. They
24 suggested we go to a mediation with them and try to further
25 resolve this matter with them. They subsequently, just prior

1 to the time that that mediation was to begin, stated that
2 they would not attend the mediation. They were no longer
3 interested in any attempts at mediation. Everything they've
4 done since the time that they represented that they would no
5 longer be involved in the adversary proceeding or matters
6 related to it, go to the heart of that particular proceeding.
7 They've never withdrawn despite having told the Court that
8 they were withdrawing from that proceeding. They've never
9 withdrawn from that proceeding. We have no record of anyone
10 else, any other outside counsel having actually appeared or
11 done anything in that proceeding. All matters related to
12 that fraudulent conveyance matter have been dealt through
13 with Paul Hastings since the inception of this case, and it
14 goes back to the -- at the heart of our problem with this,
15 and why it's the -- it remains part of Magten's overall
16 focus, the heart of our problem with this is the fact that
17 Paul Hastings having been on both sides of the transaction,
18 the fraudulent transfer transaction, Paul Hastings in fact
19 did have a conflict there and that conflict has in fact
20 pervaded everything they've done in this case. It truly
21 calls into question whether they dealt with all the creditors
22 of this case equitably, which we understand the standard to
23 be. And as a consequence of that, until the disqualification
24 motion is decided, they should not have their final fees
25 ruled upon. With respect to the particular matters that they

1 said that they withdrew from they shouldn't get any fees
2 from that either. We've laid out for Your Honor about
3 \$308,000, I believe, in expenses that we were able to glean
4 from their fee application was either related to the Magten
5 -- all was related to the Magten adversary proceeding, and
6 we've laid out for Your Honor what those were. But in the
7 process of taking discovery in this case, it also became
8 apparent that Paul Hastings, admittedly so, did not keep its
9 time records in such a manner that it was actually separating
10 the time that it was spending on matters related to the
11 Magten adversary proceeding, and so we've asked Your Honor to
12 direct them to go back and do so, so that we can get a
13 clearer picture of how much in fact was devoted to that. At
14 this point, Your Honor, in terms of the conflict, the other
15 point that I wanted to make was, it would appear rather clear
16 that although when we first made the disqualification motion
17 we stood alone in claiming that Paul Hastings had a conflict.
18 Your Honor has now also seen that in the context of the 9019
19 motion, other parties came forward and set forth what they
20 believe was Paul Hastings' conflict as well. The Plan
21 Committee, the Creditors Committee, the Ad Hoc, Class 7
22 Committee, both of them filed objections to the 9019, and one
23 of the principal objections they filed in the 9019 hearing
24 for the settlement was the fact that they felt that Paul
25 Hastings had such a conflict. So, I think at this point, our

1 point simply is that there's a fairly -- There's no question
2 that there was a fraudulent transfer. There's no question
3 that Paul Hastings was on both sides of the transfer.
4 There's a fairly substantial argument that as a result of
5 that conflict, they should have been disqualified from being
6 the debtor's counsel, and they certainly should have been
7 disqualified from dealing with that particular matter. They
8 represented to the Court that they were not going to deal
9 with that matter, with the fraudulent transfer, at least with
10 respect to Magten's objection to it. They continued to do
11 so. They put in a fee application that has some \$300,000 of
12 time that can be clearly identified in that respect, but
13 they've admitted that they didn't keep their time in such a
14 manner that other time that might have been spent on it is
15 not also buried in other areas, and as a consequence, the fee
16 application should be deferred for the time being until the
17 disqualification is decided and absent that, if Your Honor
18 wants to deal with the fee application, the \$300,000 should
19 not be granted to them, and they should be directed to go
20 back and determine from their own time records other time
21 that was spent on that matter. Thank you, Your Honor.

22 THE COURT: Thank you.

23 MS. PHILLIPS: Good afternoon, Your Honor.

24 Margaret Phillips of Paul Weiss Rifkind Wharton & Garrison on
25 behalf of the Plan Committee. I want to sort of clarify for

1 the record something Mr. -- Magten's counsel just stated that
2 one of the Plan Committee's principal objection to the
3 settlement motion that was denied was the fact that Paul
4 Hastings had a conflict. That was not the case. The
5 principal objection was the fact that the settlement
6 expressly violated the terms of the plan, and I also wanted
7 to express the Plan Committee's support of Paul Hastings' fee
8 application. This has been a difficult and complex Chapter
9 11 case, as I'm sure Your Honor is aware at this point, and
10 the debtor's plan of reorganization was successfully
11 confirmed because of the tireless efforts of Paul Hastings
12 and the other professionals that were involved in this case.

13 THE COURT: Thank you. Do you want to respond, Mr.
14 Austin?

15 MR. AUSTIN: First off, to clarify the record, Your
16 Honor, Northwestern and certainly Paul Hastings takes issue
17 that (a) there was a fraudulent transfer, a transfer of the
18 assets from Clark Fork to Northwestern, and (b) that Paul
19 Hastings itself has a conflict. Essentially all I've heard
20 Mr. Ameani do is to reargue his disqualification motion.
21 That matter had been resolved in favor of Paul Hastings.
22 There's been no stay of that. The history that he tried to
23 bring up is effectively not relevant. You know, the Court,
24 Judge Case after full deliberations and hearing denied the
25 motion to disqualify and in its rulings did not put any

1 restrictions on Paul Hastings as to the role it could play
2 and the services it rendered as general lead bankruptcy
3 counsel to Northwestern. The issues which Mr. Ameani claims
4 that Paul Hastings effectively shouldn't have been involved
5 in was development and reorganization plan that was
6 overwhelmingly supported by Northwestern's approximately, I
7 guess, 98 percent of its creditor body, and effectively
8 responding to objections raised by Law Debenture and Magten,
9 which, I guess, Mr. Ameani's suggesting that we're supposed
10 to depress to know exactly what Magten's going to raise
11 before it raises it and should be prepared to have some else
12 to deal with the situation. That simply is not how this
13 bankruptcy case was run, and it was not how Magten -- It was
14 not -- Magten was aware of anything different. As to the
15 Magten adversary proceeding, the Greenberg Traurig firm as of
16 that point was counsel of record and it was clear as we
17 stated we stepped back and took no more action in that case.
18 And the last point, Your Honor, we do take issue with how our
19 time was kept. We clearly delineated our time. We kept it
20 in accordance with the rules. We had more multiple sub-files
21 for which we recorded time and the time that related to the
22 Magten litigation, the going-flat litigation, as we called
23 it, it was what we called Magten 41, and other than one item
24 which we did make an adjustment for, Your Honor, all that
25 time was recorded prior to the point that we advised the

1 Court we were stepping down as counsel to Northwestern with
2 respect to that actual pending adversary case. In this
3 particular instance, Your Honor, Judge Case effectively said
4 through confirmation of the plan, that the plan was fair and
5 equitable, and that the creditors -- to all creditors, and
6 indeed, the creditors noted this by voting overwhelmingly to
7 support this. Subsequent history that Mr. Amedi's trying to
8 bring up also is not relevant, and we ask the Court to deny
9 Magten's objections and approve the application. One last
10 point, is just an observation, on the one hand Mr. Amedi was
11 arguing last week that this application should come on. But
12 seemingly today, he's having kind of a different perspective
13 in that you should effectively defer ruling on it pending the
14 outcome of the appeal for which there was no stay. We also
15 want to make a correction, Your Honor, when last week we
16 suggested that possibly the Court should defer ruling until
17 there's a completion of the District Court ordered mediation.
18 We have reviewed the matters that are going to be addressed
19 before the mediator, and we retract that statement, Your
20 Honor. We do not think there's a need for this Court to
21 delay ruling on the application pending the outcome of the
22 mediation. Those issues before the mediator would not, we
23 believe, effect the ultimate result by this Court hopefully
24 granting the application and making payment if for some
25 reason down the road, there's an adverse ruling to Paul

1 Hastings either as to the disqualification motion or what
2 have you. We believe at that point an appropriate remedy
3 could be fashioned because we are officers of this Court.
4 This case is still pending before this Court. It has not yet
5 been closed, and if this matter is ever remanded back and
6 we're forced to order disgorgement in any way, we certainly
7 are available and before this Court to face those
8 consequences. Thank you.

9 THE COURT: Thank you. I'll take this matter under
10 advisement. Do we have the Graves' application? Counsel.

11 MR. ABBOTT: Good morning, Your Honor. Just
12 barely. Maybe it's still morning for a minute or so. Your
13 Honor, my name is Derek Abbott of Morris, Nichols, Arsht &
14 Tunnell. I'm here on the related matters of the revised
15 final fee application of the Graves Law Office and the
16 alternative nunc pro tunc application for the debtors to
17 retain ELM Consulting. Your Honor, I'm here in both those
18 capacities. By way of preview, Your Honor, very briefly, I
19 think it's important to note at the outset that we have come
20 to peace with Mr. Smith who I think is on the phone and will
21 acknowledge that with the exception of a couple of issues.
22 The two issues that I think the Court's interested in hearing
23 about and Mr. Smith is obviously reserving judgment on are
24 the issue of the propriety of Graves Law Office paying fees
25 to ELM Consulting as an expense. That said, Your Honor,

1 we've discussed with Mr. Smith his comments both to the fees
2 and expenses relating to Graves Law Office, and other than
3 the propriety of the structure, the fees and expenses of ELM
4 Consulting, Your Honor, and to be brief, what we're left
5 with, Your Honor, is a revised final fee application
6 reflecting the comments of the fee auditor for fees in the
7 amount of \$185,435 for Graves Law Offices and expenses --
8 and, Your Honor, I'll put those in two buckets to make it
9 clear. Expenses not related to the fees of ELM Consulting in
10 the amount of \$60,737.11 and then a balance after a number of
11 deductions for expenses of Graves Law Office for ELM fees in
12 the amount of \$841,793.11. Your Honor, the deductions per
13 Mr. Smith's comments to the ELM matter were approximately
14 \$22,000 related to an expense surcharge noted by the Court at
15 one of the prior hearings. Your Honor, an adjustment of
16 eight thousand some odd dollars related to the
17 appropriateness of the billing for non-working travel time.
18 \$148.87 adjustment, Your Honor, for a meal that wasn't
19 sufficiently described. A \$5 charge for an alcoholic
20 beverage, Your Honor. And a \$16,492 communications charge.
21 All of those items, Your Honor, were reduced to get us to
22 that final aggregate number of both ELM related expenses and
23 other case expenses of \$902,000 -- excuse me, \$902,530.22.
24 Your Honor, what I would like to do is spend a little time
25 describing the background. I've got two witnesses that I

1 think together hopefully should be in the twenty to thirty
2 minute range, depending on the Court's questions. I do note
3 there are no objections to either of these applications, and
4 perhaps the easiest thing to do, Your Honor, would be to
5 commence with the testimony, but I'm at the Court's pleasure
6 on that.

7 THE COURT: Go ahead, proceed as you wish.

8 MR. ABBOTT: I'd like to call, Your Honor, Lee
9 Graves to the stand.

10 THE COURT: All right.

11 LEE GRAVES

12 being duly sworn according to law, testifies as follows:

13 DIRECT EXAMINATION

14 BY MR. ABBOTT:

15 Q. Mr. Graves, would you please tell the Court who you are
16 and what you do.

17 A. My name is Lee Graves. I am principal in Graves Law
18 Offices as well as principal of ELM.

19 Q. Can you explain what Graves Law Offices is and then
20 follow up with an explanation briefly of what ELM Consulting
21 is?

22 A. Yes. Primarily Graves Law Offices is an environmental
23 law practice in which we focus on environmental remediation,
24 natural resource damages, and overall environmental
25 compliance issues. Our firm is a very small firm. We only

1 have three attorneys of which I'm the principal again. ELM
2 Consulting is a environmental consulting firm of only twenty
3 people. Approximately, they're made up of environmental
4 engineers, design engineers, geologists, ecotoxicologists,
5 human health toxicologists, and are primarily individuals
6 with I would say on the average of over fifteen years'
7 experience with those folks.

8 Q. When did you first become associated with Northwestern
9 Corporation or its affiliates?

10 A. I would say approximately three years ago, just prior to
11 the acquisition of Montana Power by Northwestern.

12 Q. Can you explain in rough terms what the Graves Law
13 Offices do for Northwestern and its affiliates?

14 A. Primarily we handle all their environmental matters
15 which range from the management of several manufactured gas
16 sites in three states, Nebraska, South Dakota, and Montana.
17 Of those nine, there's three, I would say, active sites in
18 Helena, Montana. Aberdeen and Mitchell, which have been part
19 of a voluntary program with enforcement oversight by the
20 agencies. Graves Law Offices has been working on those sites
21 in conjunction with the consultants. We have been doing
22 pilot studies, characterizations, sampling to determine what
23 risk to human health in the environment are at those sites.
24 Coordinating that matter with Northwestern as well as with
25 the state and federal agencies. There's other sites in

1 Nebraska which we're beginning conversations with state
2 agencies on as well. We've also provided support services
3 for Northwestern through the bankruptcy as to quantification
4 of environmental liabilities that support the plan. We've
5 been doing enforcement compliance and auditing for the
6 company in its general operation. We have been supporting
7 quantification of liabilities as it relates to the reserve
8 numbers for SEC reporting requirements, Sorbey & Oxie
9 (phonetical) requirements. And also been managing the
10 Milltown Dam matter in negotiations near Mesula (phonetical),
11 Montana.

12 Q. In the course of your representation of Northwestern as
13 affiliates, does the Graves Law Office use consultants?

14 A. Yes, we do.

15 Q. Can you describe the use of those consultants very
16 generally for the Court, please.

17 A. Generally, we hire experts in that environmental matters
18 generally are very technically driven as to environmental
19 risks, fate and transport of constituents, clean-up levels,
20 quantification of contamination in the environment, how to
21 clean it up, how to approach it, and with that takes a number
22 of different disciplines to draw conclusions and give -- Just
23 to give an opinion as to the issues. Graves Law Offices
24 retains consultants and different firms including the ELM
25 Consulting to manage those expertise under an umbrella of

1 attorney/client privilege in anticipation of litigation. And
2 those experts all are directed by counsel and that allows the
3 opportunity to manage the strategy and hopefully end resolve
4 of the liability for the corporation.

5 Q. This structure that you've described where Graves Law
6 Office retains the consultants directly in order to protect
7 attorney/client privilege and work product protections, is
8 that structure unique to your firm's engagement with
9 Northwestern or is that what you do with all your clients?

10 A. Depending upon the matter. The majority of our matter
11 is anticipation of litigation. So we will retain experts
12 directly, and I know ELM Consulting has been retained by law
13 firms directly if Graves Law is not the law firm involved.
14 So the general state of the industry is very litigation
15 driven in terms of environmental matters, and so, the
16 majority of the experts working with legal counsel are of a
17 privilege nature.

18 Q. And just so the Court's got this information, Mr.
19 Graves, how long have you been involved in the environmental
20 litigation and legal arena?

21 A. Probably about -- I guess career stretching from more of
22 a finance attorney and contract attorney in Washington in the
23 '80s, Exxon-Valvese (phonetical) ran aground, I went back
24 into the federal government as an attorney to work on the
25 Exxon-Valvese matter and take over major litigation for

1 federal and state agencies in California, Montrose Chemical
2 litigation which was the preeminent natural resource damage
3 case in the country and, I think, still is today.

4 Q. Is it fair to say that you're relatively experienced in
5 the environmental litigation world?

6 A. I think the basis of the natural resource damage and
7 remediation experience -- our practice is a small practice
8 but we're probably preeminent in the field. There's probably
9 no better group of experience in the country than we have
10 internally between technical folks and myself on the legal
11 matter.

12 Q. Focusing again quickly on the differences between what
13 Graves Law Offices does and what ELM Consultants do for
14 Graves Law Offices, I want to ask you a series of questions
15 regarding ELM Consulting's role, not Graves Law Office but
16 ELM Consulting's role. Would you say that ELM Consulting had
17 the responsibility to control, manage, administer, invest,
18 purchase, or sell assets significant to this debtor and its
19 reorganization proceedings?

20 A. No.

21 Q. Was ELM Consulting itself involved in the negotiation of
22 a plan of reorganization?

23 A. No.

24 Q. Is the service the ELM provides directly related to the
25 principal work carried out by the debtor or the routine

1 maintenance of its operation?

2 A. No.

3 Q. Did anyone at ELM Consulting have the discretion or
4 autonomy to exercise professional judgment in the
5 administration of the Northwestern debtor's estates?

6 A. No.

7 Q. Were professionals -- Excuse me, were ELM Consultants
8 heavily involved in the administration of these cases?

9 A. I'm sorry, which cases?

10 Q. I'm sorry, the Northwestern bankruptcy cases.

11 A. No.

12 Q. And finally, you talk a little bit about some of the
13 qualifications for the consultants at ELM, but did they
14 possess some special skill or knowledge that would leave one
15 to believe that they are professionals in the ordinary
16 meaning of the word?

17 A. As it relates to their discipline, yes.

18 Q. Thank you. Back to your involvement with this estate or
19 these debtors and both pre-petition and during the case, do
20 you understand that on or about the first day or week of the
21 case these debtors sought court approval to use both Graves
22 Law Office and ELM Consulting as ordinary course
23 professionals in these matters?

24 A. Oh, absolutely.

25 Q. And sometime later was there a different sort of

1 retention sought for Graves Law Office?

2 A. I believe -- I hope I get the character right, it's
3 special counsel and that was I think due primarily to the
4 amount of monies going through shifted that from ordinary to
5 special. I believe that's the nomenclature for its shift.

6 MR. ABBOTT: Your Honor, may I approach the witness
7 with a document?

8 THE COURT: Yes.

9 MR. ABBOTT: And the bench as well, Your Honor, in
10 case you haven't got the Graves retention application in your
11 binder.

12 THE COURT: I've got it.

13 MR. ABBOTT: Thank you, Your Honor.

14 BY MR. ABBOTT:

15 Q. Mr. Graves, I've handed you a document that on its face
16 is marked Docket No. 591 dated December 22nd, 2003. Have you
17 seen this document before?

18 A. Yes.

19 Q. And is this the application that the debtors filed to
20 retain Graves as special counsel?

21 A. Yes, it is.

22 Q. Does this document disclose the structure of the
23 relationship between Graves Law Office and Elm Consulting?

24 A. Yes, it does as does our original engagement letter
25 prior to bankruptcy. I believe it's page 3, item 6.

1 Q. That's the discussion in the application. Is not that
2 engagement letter -- I stand corrected. I believe the copy
3 that I handed you does not have all the attachments and I
4 apologize, but to the best of your belief was the engagement
5 letter between the debtors and Graves Law Offices attached to
6 that application?

7 A. Yes, it was, the original application. I don't see it
8 on this copy though.

9 THE COURT: Are you talking about Mr. Graves'
10 affidavit?

11 THE WITNESS: No, it was the original engagement
12 letter of Graves Law Offices with Northwestern prior to
13 bankruptcy.

14 THE COURT: Oh.

15 MR. ABBOTT: Your Honor, I had understood that was
16 attached and disclosed as redacted to protect certain
17 confidential information. I've got a copy here I could hand
18 up if it's not attached to the Court's copy.

19 THE COURT: I've got a copy of the docket file and
20 I don't see that attached. Is it marked as an exhibit or a
21 schedule?

22 MR. ABBOTT: Your Honor, I believe it was, although
23 I don't -- It was filed under seal, Your Honor. Footnote 3
24 on page 3 of the application reflects that it was filed under
25 seal because it did have some privileged information in it.

1 The copy I've got that is attached to my copy has been
2 redacted, I believe. Your Honor, very briefly, my point in
3 referencing this was to point to the disclosures made in
4 there that were not redacted regarding the structure of the
5 arrangement between ELM Consulting and Graves Law Offices.
6 Again, I'm happy to hand that up to the Court if it was not
7 included in the file as having been filed under seal, but I
8 could just as easily, perhaps, get Mr. Graves to testify to
9 that disclosure.

10 THE COURT: I don't have anything from the docket
11 sheets which are included in the applications and that has
12 anything to do with the scope and services pre-petition, but
13 what has attached here is a retention letter, Exhibit B, and
14 then there is in the application the recitation relative to a
15 connection between Graves and ELM and how Graves will in turn
16 employ an environmental consulting firm to perform
17 environmental work including field sampling, laboratory
18 testing remediation and one of those firms is ELM, E-L-M.

19 MR. ABBOTT: Your Honor, I believe Exhibit B was
20 the document to which I was referring. It's an engagement
21 letter, Your Honor, dated December 14, 2001. If I may
22 approach, I could hand the Court my copy.

23 THE COURT: That's not in the exhibit I have, but I
24 have seen that exhibit in a prior hearing.

25 BY MR. ABBOTT:

1 Q. Mr. Graves, did that engagement letter attached as
2 Exhibit B describe the structure of GLO's retention of ELM
3 Consulting and also disclose the nature of your majority
4 ownership interest in each of those entities?

5 A. Yes, and it was also representative of the discussions
6 with Northwestern management in that one of the other
7 managers of ELM was with me when we initially met with and
8 introduced how to manage environmental liabilities, the
9 combined approach using ELM for privilege and legal and the
10 consulting for the technical support.

11 Q. And that structure and arrangement was the arrangement
12 and structure that existed when you were first retained in
13 2001 --

14 A. Correct.

15 Q. -- and throughout the duration of the bankruptcy case
16 and in fact today, post-confirmation in effect today; is that
17 true?

18 A. The relationship and how the environmental sites are
19 being managed hasn't changed since the first engagement in
20 2001.

21 Q. Thank you.

22 MR. ABBOTT: Your Honor, that's all I have for Mr.
23 Graves.

24 THE COURT: All right.

25 MR. ABBOTT: I would pass the witness to the Court

1 or interested parties if there's further inquiry.

2 THE COURT: I have no questions. Thank you very
3 much.

4 THE WITNESS: Thank you, sir.

5 MR. ABBOTT: Your Honor, I would next call Mike
6 Young.

7 MICHAEL J. YOUNG

8 being duly sworn according to law, testifies as follows:

9 DIRECT EXAMINATION

10 BY MR. ABBOTT:

11 Q. Mr. Young, will you please tell the Court who you are
12 and what you do.

13 A. Yes. My name is Michael J. Young. I'm a senior
14 corporate counsel at Northwestern Corporation, and my
15 principal responsibilities are to work doing the commercial
16 work of the utility and in that context I handle basically
17 all of the environmental work for the utility.

18 Q. And how long have you been with the company?

19 A. I've been with Northwestern since January 1st of 2001.

20 Q. And in connection with your responsibilities with the
21 company, are you aware of Graves Law Office and ELM
22 Consulting?

23 A. Yes, I am.

24 Q. Since when?

25 A. I was first introduced to Graves Law Offices and ELM

1 Consulting approximately this time during the year 2002,
2 shortly after we had closed on the Montana Power acquisition.
3 So it might have been the May/June time period of 2002.

4 Q. Are you aware of the structure of their engagement
5 whereby Northwestern retained Graves and Graves retained
6 consultants?

7 A. Very much, yes.

8 Q. Do you understand why they do that?

9 A. Yes, I've -- In my previous employments both with
10 Northwestern with NRG Energy in Minneapolis and also with
11 Cargale (phonetical) Inc., I was involved pretty
12 significantly with environmental work, and at both those
13 companies, similar to the way Northwestern has it structured,
14 we would typically engage a consulting firm directly through
15 the use of outside counsel.

16 Q. And why was that?

17 A. The principal reason was to solidify the privilege
18 because a lot of the work was done in anticipation of
19 litigation.

20 Q. And is this structure an arrangement one that
21 Northwestern employs with counsel other than Graves from time
22 to time?

23 A. Yes, I have some recollection on that and certain
24 matters Northwestern has engaged other consultants through
25 the use of lawyers particularly when there's anticipated

1 litigation.

2 Q. Is it your understanding that this structure, in terms
3 of the retention, has always been in place with Graves Law
4 Office as far as you're aware?

5 A. Yes, as far as I'm aware, and in fact, I did work on the
6 engagement letter, so I was very familiar with the structure.

7 Q. Would you describe briefly in your own words what Graves
8 Law Offices does for Northwestern?

9 A. Well, it's kind of a unique relationship because you
10 kind of get a double bang for your buck. I mean, you get Lee
11 Graves who's an extremely experienced environmental lawyer
12 who had significant experience in negotiating settlements and
13 consent decrees with regulatory agencies, which is something
14 that Northwestern was involved with very deeply once it
15 acquired Montana Power with respect to the Milltown Dam
16 situation. And then of course we saw coming down the
17 pipeline potential other problems and issues involving
18 manufactured gas plant sites in our states in which we
19 operate, and on top of that, he was affiliated with a very,
20 very strong consulting firm that had a high level of
21 competency, was extremely well respected in the industry.
22 So, we felt that we were making a very efficient engagement
23 by getting access to two very valuable resources.

24 Q. And you were sitting here in the courtroom when Mr.
25 Graves testified about what he did for the company; is that correct?

1 A. That's correct.

2 Q. Was his testimony consistent with your understanding of
3 their role?

4 A. Yes.

5 Q. How critical to the operations of Northwestern are the
6 services that Graves Law Offices provides?

7 A. In my opinion, very substantial. When Northwestern
8 acquired Montana Power Company, it was the last part of a
9 major divestiture involving the unwinding or the unbundling
10 of a vertically integrated utility out in Montana, and when
11 the generation assets were sold to PPL, a significant number
12 of environmental human resources went with that transaction.
13 So, Northwestern, when I came on board and was assigned the
14 responsibility to deal with the environmental issues, it was
15 pretty clear to me that internally we did not have the human
16 resource power to manage these situations going forward
17 efficiently and effectively because we didn't have the
18 manpower, the people-power to do it. So, a decision was made
19 by senior management to go the route of using outside
20 consultants to manage the environmental affairs, working with
21 an in-house lawyer.

22 Q. And I realize I'm getting into a sensitive area here, so
23 I want you to be limited of course to publicly disclosed
24 information, but is there a disclosed general order of
25 magnitude that you can describe either the alleged or

1 potential liability involved in the environmental matters
2 that Graves Law Office is involved in on Northwestern's
3 behalf?

4 A. Sure. Currently in our public filings, most recently
5 our 10(k), we list out an environmental reserve amount of I
6 believe approximately \$43 million. So that is the company's
7 assessment at this point of what it believes it is going to
8 be responsible for going forward with its environmental
9 matters, and in addition, obviously in this bankruptcy there
10 was a very public situation involving the Milltown Dam super-
11 fund site in which I believe claims were filed in the
12 neighborhood of \$150 million against the company and the
13 estate for potential responsibility at the Milltown Dam and
14 through the efforts of Graves Law and the Paul Hastings firm
15 and ELM Consulting we were able to structure a very, very
16 favorable settlement to the benefit of the estate of roughly
17 \$11 million.

18 Q. Now, I realize that a lot of people contributed to the
19 confirmation and effectiveness of the plan of reorganization,
20 but in your mind could the company have done it without the
21 sort of assistance that Graves Law Office provided the
22 debtors?

23 A. No, I think it would have taken significantly longer to
24 get this company through the bankruptcy process, in my
25 opinion, because we would have had to go out and hire the

1 necessary resources to go out and assess the environmental
2 situation, do an inventory of potential environmental
3 liabilities, and then do a quantification of those
4 liabilities, and Graves Law and ELM were extremely familiar
5 with all the company's environmental situations in all three
6 of its states and were able to work effectively and
7 efficiently with the Paul Hastings firm to develop a plan for
8 dealing with the environmental liabilities and to implement
9 or structure that plan within the filing documents.

10 Q. Thank you, Mr. Young.

11 MR. ABBOTT: I have no further questions, Your
12 Honor, and I would pass the witness.

13 THE COURT: Thank you, Mr. Young. Does that
14 conclude your testimony?

15 MR. ABBOTT: That concludes the testimony, live
16 testimony, Your Honor. I do wish to ask the Court to take
17 judicial notice of some of the entries on the docket and the
18 record in the bankruptcy case generally, and I'd be prepared
19 to address that in the beginning of my argument, if I might,
20 Your Honor.

21 THE COURT: Go ahead.

22 MR. ABBOTT: Your Honor -- Your Honor, this company
23 filed its petition on September 14th, 2003. As Mr. Graves
24 testified, it sought the ability to use ordinary course
25 professionals in the ordinary course of its business. On

1 September 17th, that was docket item 38, Your Honor. Listed
2 on the exhibit there were both Graves Law Office and ELM
3 Consulting. That motion, Your Honor, was approved at docket
4 item 200 on October 10th and contained what are fairly
5 customary monthly and aggregate caps for those professionals.
6 Your Honor, because it looked like the caps would likely be
7 exceeded with respect to these professionals, on December
8 22nd, 2003 at docket item 622, the debtors filed their
9 retention application of Graves Law Offices, and I would ask
10 the Court to take judicial notice of that. Mr. Graves
11 identified it, and I note, Your Honor, that that application
12 disclosed the structure of the engagement, described in the
13 scope of their services under paragraph (9), Your Honor, that
14 Graves would retain and direct environmental consultants and
15 contractors and the management of environmental liabilities
16 and remediation of sites. That's 9(c), Your Honor. When
17 discussing the compensation and expenses at paragraph (11),
18 Your Honor, that that application stated that in addition to
19 the hourly rate set forth above, Graves customarily charges
20 its clients for all costs and expenses incurred including
21 environmental consulting services, telephone and tele-copier,
22 toll and other charges and a number of other fairly
23 traditional charges. Your Honor, that's paragraph (11) on
24 page 4 of the application. Your Honor, on January 14th,
25 2004, Judge Case then presiding over this proceeding entered

1 the order as far as we can tell without any objection, Your
2 Honor. That's docket item number 696. On page 2 of that
3 order, it states that the debtor's authorized pursuant to
4 327(a) and Bankruptcy Rule 2104 to retain and employ Graves
5 as special counsel in this Chapter 11 case, upon the terms
6 and conditions set forth in the application and the Graves
7 affidavit effective as of the petition date. Your Honor,
8 that's the background of how Graves got into the case and
9 their efforts to -- or the debtors' efforts to have them
10 approved to provide services to the debtors. Throughout the
11 course of the case, Graves submitted interim and quarterly
12 fee applications. The Court in some previous hearings and
13 certainly Mr. Smith had noted some problems with those
14 applications that I think we have now corrected and resolved
15 in connection with our discussions with Mr. Smith and the
16 reductions that both the Court has imposed and Graves and ELM
17 have agreed. The Court in some earlier hearings raised the
18 question of whether it was appropriate for Graves Law Office
19 to be able to pay its consultants directly, and I want to try
20 to respond to those, Your Honor. As a result of those
21 comments, also on the docket at number 2622, which is still
22 pending is that nunc pro tunc retention application. It was
23 supplemented on February 7th, Your Honor, with a request that
24 in the event that that application needed to be ruled on,
25 that ELM would request some modest relief to which I don't

1 think the fee auditor had an objection regarding its billing
2 practices and the customary sort of billing practices used
3 for environmental consultants of ELM's kind. In addition,
4 based on some of their earlier comments at hearings, Graves
5 submitted a revised final fee application at docket item
6 2959. That is the document, Your Honor, to which Mr. Smith
7 has noted some deficiencies and as to which recommendations
8 or deficiencies we agreed to concede. Your Honor, I really
9 have three points that I'd like to make in legal argument.
10 The first is that we believe given the historical record in
11 this case, the disclosure of the engagements and the
12 retention order granted earlier in the case that there is a
13 law of the case argument that would suggest to us that ELM
14 need not be separately retained. Additionally, and perhaps
15 alternatively, Your Honor, there is a case law extant in this
16 circuit that suggests that environmental consultants are not
17 professionals within the context of 327, they need to be
18 retained by the Court. And my final point, Your Honor, and I
19 want to go through each of those a little more carefully, but
20 my final point, Your Honor, would be alternatively, if the
21 Court is more comfortable with such a nunc pro tunc
22 application, that on the, I think, relatively well settled
23 nunc pro tunc application law in this circuit, nunc pro tunc
24 retention in this case would be warranted. And I'd like to
25 start with the idea of the law of the case, the two Third

1 Circuit cases I'd like to talk about first are Hamilton v.
2 Leevy (phonetical), which is 322 F.3d 776, and Africa v. City
3 of Philadelphia, which appears at 158 F.3d 711. Together,
4 Your Honor, those cases suggest the following about law of
5 the case: The doctrine of law of the case is intended to
6 limit the re-litigation of an issue once it's been decided
7 either explicitly or by necessary implication. The intent of
8 that doctrine is to promote finality, consistency, and
9 judicial economy. There's an exception for certain matters
10 including new evidence. It's clear, Your Honor, from those
11 cases that the application of the law, the case doctrine,
12 does not restrict this Court's power but informs the exercise
13 of the Court's discretion. The law, however, suggests that
14 the discretion to refrain from applying the doctrine should
15 only be used in extraordinary circumstances which I submit
16 are not present in this case. Those circumstances are things
17 like new evidence, supervening new law, or that the earlier
18 decision was clearly erroneous and would create manifest
19 injustice. Respectfully, Your Honor, we submit that there
20 are no such extraordinary circumstances to warrant a
21 departure from the law of the case doctrine in this case and
22 the previously approved retention application that adopted
23 the structure set forth in the application and the letter
24 agreement. Your Honor, as an aside to that, I note that
25 § 328 of the Code would otherwise allow the Court to change

1 the terms and condition of compensation after the conclusion
2 of services only if the terms and conditions proved to have
3 been improvident in light of circumstances not capable of
4 being anticipated at the time of the fixing of such terms and
5 conditions, and, Your Honor, here where they've been
6 disclosed in advance, we don't think we're in that bailiwick.
7 Your Honor, we do know from Mr. Graves' testimony that it's
8 frequent in his practice that this structure is used. We
9 know that the ELM services were specifically contemplated by
10 the retention application in an order, and we think the law
11 of the case ought to govern, Your Honor. The second prong of
12 my argument as I described is the reference to the line of
13 cases, the most, I think, well known of which is a case
14 called In Re: Napoleon in this circuit. It's at 233 BR 910.
15 That case cites another case In Re: Sealing Associates
16 Limited, which is 128 BR 721. They stand for the proposition
17 that environmental experts or consultants need not be
18 retained specifically under 327 as they're not necessarily a
19 professional as contemplated by § 327 of the Code. The other
20 case that I would cite in that regard, Your Honor, is a 2001
21 case from Puerto Rico at 259 BR 484. Again there the Court
22 found an environmental wet lands expert was not a
23 professional as contemplated by 327. These cases are not
24 riding on a clean slate, Your Honor. There is some
25 jurisprudence in this jurisdiction regarding those factors,

1 and as I'm sure you heard Mr. Graves run through a series of
2 questions that were designed to get at those factors, Your
3 Honor, and those factors are laid out I think most recently
4 in the AC&S case in this district, which appears at 297 BR
5 395. That's a 2003 case that highlights the six factors that
6 Judge Farnan in the earlier First Merchants case established.
7 Those factors are whether the person to be employed controls,
8 manages, administers, invests, purchases, or sells assets
9 significant to the reorganization. Whether that person would
10 be involved in negotiating the plan of the reorganization.
11 Whether that person's employment directly related to the type
12 of work carried out by the debtor or to the routine
13 maintenance of the debtor's operations. Whether the person
14 to be employed is given discretion or autonomy to exercise
15 professional judgment in the administration of the estate,
16 and finally whether those persons are possessed of some
17 special skill or knowledge that would leave one to believe
18 they are professional within the ordinary meaning of that
19 term. Your Honor, pursuant to Mr. Graves' testimony and I
20 think consistent with Mr. Young's testimony, the ELM
21 Consulting folks are certainly professionals within the
22 ordinary sense of the meaning, but that's the only one of
23 those six factors, Your Honor, that suggests that they are
24 professionals that would need to be retained. We understand
25 from the earlier transcripts and record in the case that Your

1 Honor has a concern about that, and for that reason, Graves
2 did file a nunc pro tunc application to be employed and
3 retained in the case. That alternative relief, Your Honor,
4 we would ask the Court to approve if in fact it is not
5 inclined to grant the application for fees including the ELM
6 expenses that's presently before Your Honor as amended,
7 pursuant to discussions with Mr. Smith. Your Honor, there
8 are a couple of cases in this circuit that talk about the
9 propriety of nunc pro tunc application. The two leading
10 cases are In Re: Arkansas at 798 F2d 645, and the most recent
11 case that I could find at the Third Circuit level that
12 addresses this issue and in fact clarifies to some extent the
13 Arkansas case was the In Re: FS Air Lease II, Inc., case at
14 844 F2d 99. The FS Air Lease added a couple of questions to
15 the standard from Arkansas and they were (1) sort of at the
16 global level, could this applicant have been retained
17 initially, and (2) are circumstances extraordinary so as to
18 warrant approval on a nunc pro tunc basis. The cases talk
19 about the reasons and the importance of prompt application by
20 a debtor for the retention of its professionals, and I think
21 those reasons have been met in this case where the debtor did
22 in fact seek approval of both GLO and ELM as ordinary course
23 and ultimately for Graves Law Offices as 327(e) counsel, but
24 the factors that the Court says are to be considered are
25 largely inapplicable in this case. The first is, did the

1 applicant or someone else have the responsibility for
2 applying? Well, Your Honor, in this case whether it was the
3 applicant or someone else, and I would submit that it was
4 perhaps a shared responsibility between debtor's bankruptcy
5 counsel and Graves, but they met their burden. They did, in
6 fact, make the application. It was granted without approval.
7 The second factor, Your Honor, is was the applicant under any
8 time pressure to begin work before approval. Again, not a
9 factor that's particularly applicable to the facts of this
10 case. Graves was working both before, during, and after the
11 bankruptcy case. I think they were involved in important
12 negotiations all through it, but given the fact that within
13 three days of the filing of the case, there was an effort to
14 get Court approval for the retention. I don't think that
15 factor is particularly applicable. The third factor, again,
16 not applicable, was their delay after learning that the
17 approval was not granted. Well, in fact, Your Honor,
18 approval was granted earlier in the case, so that factor, I
19 think, at least is met here. The fourth factor is whether
20 compensation to this party would prejudice innocent third
21 parties, and nobody has suggested that, that I'm aware of,
22 Your Honor, and we don't think that's the case. The last
23 factor's a catchall and it asks the Court to consider other
24 relevant factors. Here I think there are some other relevant
25 factors, and they are principally the facts that we've heard

1 in testimony and I've discussed a little bit, the fact that
2 there was a multi-part effort to retain Graves Law Offices
3 and in acknowledgement in that retention of ELM Consulting's
4 role. There was an effort to retain ELM Consulting as an
5 ordinary course professional, and then in the alternative in
6 the recent nunc pro tunc application to retain ELM
7 Consulting. And the other factor, I think that's important
8 to consider, is that the purpose of the structure that was
9 developed and used by Graves Law Offices and other
10 environmental and other litigation firms was to retain the
11 expert directly in order to protect the company's important
12 confidential information, privileged information, and work
13 product protections. I think, Your Honor, that on those
14 facts, and I hope the Court would view those facts to be the
15 extraordinary circumstances that would warrant nunc pro tunc
16 relief in this matter if the Court believes it needs to get
17 to that application before granting the Graves Law Office fee
18 application, including the ELM fees. That said, Your Honor,
19 I'd be happy to try to respond to the Court's questions. I
20 note that this engagement structure is one that did not
21 bother the U.S. Trustee. I've been authorized to explain to
22 the Court that that was their position, and I would ask the
23 Court now to grant --

24 THE COURT: Maybe you should go to the U.S. Trustee
25 and get him to sign the order.

1 MR. ABBOTT: I understand, Your Honor.

2 THE COURT: No, I don't have any problem. Let me
3 clear up one thing with Mr. Smith here. Mr. Smith --

4 MR. SMITH (TELEPHONIC): Yes, Your Honor.

5 THE COURT: -- what are your final numbers -- Are
6 you still there, Warren?

7 MR. SMITH (TELEPHONIC): Yes, I am, Your Honor.

8 THE COURT: What are your final numbers on this
9 revised fee application that was just filed in March?

10 MR. SMITH (TELEPHONIC): Okay, Your Honor, if I
11 could come back to that question, if you don't mind? -- in a
12 roundabout way. And that is, I'd like to clear up one
13 matter, and that is we did review the fee and expenses of
14 Graves. We only reviewed the expenses of ELM. We did not
15 review the fee detail or the fees of ELM because in our mind
16 the fee detail was inadequate for us to apply our regular
17 standard of review, and so we understand that the application
18 to employ ELM provides for them providing fee detail at a
19 lesser standard of review, and we're familiar with that, and
20 we can do that, but at this time, as of this time, we have
21 not reviewed the fees of ELM. And, Your Honor, we did talk
22 to Mr. Abbott yesterday, and apparently they have agreed to
23 our reductions for Graves and those reductions included
24 travel time of \$843.75, a reduction for conflicts of \$337.50,
25 and accounting billing issue of \$112 and \$30.50 in reduction

1 for alcoholic beverages.

2 THE COURT: So that comes out to what as far as the
3 expenses?

4 MR. SMITH (TELEPHONIC): Your Honor, I've not added
5 those up. I could just -- hang on, Your Honor. Your Honor,
6 since ELM was listed in the Graves application as an expense,
7 I've not totaled up the other reductions because those are
8 fee and expense reductions. Your Honor, if I could address
9 the agreement we had regarding reductions on ELM?

10 THE COURT: Yes.

11 MR. SMITH (TELEPHONIC): Again, we had only
12 reviewed the expenses of ELM not the fees. There were
13 basically five issues on the ELM expenses. One was the
14 communications fee. That was in the amount of \$16,492.25.
15 It was our understanding that that was basically a fee that
16 was based on a percentage of the time billed, and it's our
17 understanding that they've agreed to waive that fee. We
18 asked a question, Your Honor, regarding travel time that was
19 imbedded in the ELM time records. It was unclear to us what
20 that travel time was, and we've not gotten a response to that
21 question. It's our understanding they will agree to reduce
22 that travel time by fifty percent, but again, we don't have
23 -- we are not able to quantify that number at this time. And
24 also, Your Honor, the expenses were charged a 10 percent
25 surcharge.

1 THE COURT: Yeah.

2 MR. SMITH (TELEPHONIC): And they've agreed to
3 reduce that but we have not yet quantified that as well. So
4 there are several items on the ELM expense side that have yet
5 been quantified.

6 MR. ABBOTT: Your Honor, I can provide what I
7 believe are those numbers.

8 THE COURT: Why don't you dictate them into the
9 record for me here.

10 MR. ABBOTT: I'd be happy to, Your Honor. The 10
11 percent expense surcharge that would be waived is \$21,997.74.
12 The non-working travel adjustment is \$8,047.50. Mr. Smith
13 was correct about the communication charge of \$16,492. In
14 addition we've agreed to eliminate a \$148.87 meal charge, and
15 a charge of \$5 that apparently purchased beer.

16 MR. SMITH (TELEPHONIC): Yes, Your Honor, that's
17 our understanding.

18 THE COURT: Okay. What is that total?

19 MR. ABBOTT: For that, I'm going to have to borrow
20 --

21 THE COURT: What I'm trying to get at is what's the
22 final figure you want to put in an order if I approve these
23 fees and expenses. I'm not going to sit here and guess at it
24 --

25 MR. ABBOTT: Your Honor, I've got that math done.

1 The total amount of fees would be \$902,530.22, consisting of
2 as amended ELM expense and fees of \$841,793.11 and non-ELM
3 Graves Law Office expenses of \$60,737.11.

4 THE COURT: What was the last number, 60 what?

5 MR. ABBOTT: Sixty thousand seven hundred thirty-
6 seven dollars and eleven cents.

7 THE COURT: And that totals the 902,530.22?

8 MR. ABBOTT: Yes, sir. And the fee component of
9 Graves after the reductions that we've agreed to and
10 discussed with Mr. Smith is \$185,435.

11 THE COURT: Okay. Have you got that, Mr. Smith?

12 MR. SMITH (TELEPHONIC): Yes, Your Honor.

13 THE COURT: All right. I'll take it under
14 advisement, we'll get out an order.

15 MR. ABBOTT: I appreciate it, Your Honor.

16 THE COURT: Right. Let's take -- Have we got Law
17 Debenture; is that it? How long is that going to take? Can
18 we take a break? How are you girls doing? I've just been
19 ordered to take a break.

20 UNIDENTIFIED SPEAKER: I think that would be a good
21 idea.

22 THE COURT: Let me just say one thing. We did an
23 order this morning on that arbitration case with Northwestern
24 and --

25 UNIDENTIFIED SPEAKER: National Union.

1 THE COURT: National Union Insurance Company, and
2 the Court has appointed a former justice of the Montana
3 Supreme Court, Jim Ragnier (phonetical) to be the umpire, and
4 the order specifies that he will be given \$450 per hour to
5 split between the parties and then reasonable expenses. And
6 that concludes so that the arbitration now can proceed.

7 MR. ABBOTT: Your Honor, if I might be excused from
8 reappearing, I apologize.

9 THE COURT: Yes. How about 1:15.

10 MR. SMITH (TELEPHONIC): Your Honor, if I could be
11 excused we were not requested --

12 THE COURT: Yeah, thanks, Warren.

13 MR. SMITH (TELEPHONIC): Thank you very much, Your
14 Honor.

15 (Whereupon at 12:56 p.m. a recess was taken in the
16 hearing in this matter.)

17 (Whereupon at 1:16 p.m. the hearing in this matter
18 reconvened and the following proceedings were had:)

19 THE CLERK: Please rise.

20 THE COURT: You may be seated. Well, let's see.
21 We've got some more money to look over here. It's Law
22 Debenture Trust Company of New York, request for fees of
23 \$958,075.87 and expenses of \$21,994.49, unpaid annual
24 administration fees of \$45,000, total request \$1,025,070.30.
25 Now, you may proceed, counsel.

1 MR. SNELLINGS: Thank you, Your Honor. John
2 Snellings for Law Debenture Trust Company of New York as
3 indenture trustee to the Quips. My notes say here, Good
4 morning, Your Honor. I guess I'll have to modify that and
5 say --

6 THE COURT: Well, it's still morning in Montana.

7 MR. SNELLINGS: There you go. We're here today on
8 Law Debenture's request for payment of fees and expenses that
9 was filed pursuant to a plan of reorganization back on
10 December 1st. This is for fees and expenses pre-effective
11 date and does not cover those expenses and fees that we've
12 incurred since then. It's a little outstanding here today.
13 Just eight weeks ago we were standing here presenting a
14 settlement agreement, a settlement agreement that included
15 payment of all of our fees, both pre- and post-effective date
16 in full. Debtor admitted that that settlement was in the
17 best interest of the estate, and I would also remind the
18 Court that when the debtor reneged on the agreement it wasn't
19 due to the fact that our fees were excessive, but that's
20 water under the bridge pursuant to an appeal. Now, we're
21 back to square one. In reviewing the debtor's objection,
22 there seemed to be two major themes. One is that there's not
23 enough information for them to make a determination regarding
24 our fees, and two, the issue of substantial contribution to
25 the reorganization effort. There have been with regard to

1 inadequate information this dispute that's before you today
2 is not about inadequate information. There have been over
3 220 interim and final fee applications filed in this case.
4 There have been in excess of \$47 million in fees paid. We
5 have provided sufficient information pursuant to the local
6 rules. We have provided supplemental information, additional
7 information so that they could, the debtor could do a
8 reasonable and measured review of our fees and of our
9 expenses. We have never obtained any such an analysis from
10 the debtor. So this is not about inadequate information. It
11 is not about substantial contribution either, Your Honor. No
12 indenture trustee has been held to that standard in this
13 case, whether it be Wilmington or HSPC, they've been held to
14 a very lax standard. This objection is about leverage. The
15 debtor's angry, continues to be angry that Law Debenture and
16 Magten continue to prosecute the fraudulent conveyance
17 action. Their objection seeks to use leverage -- our fees as
18 leverage so that they might push us to settle this matter
19 because the debtor equates substantial contribution to
20 reaching an agreement with the debtor as a prerequisite of
21 payment of any of our fees. That is not now nor it should
22 ever be the standard to measure an indenture trustee's
23 actions within a case. It puts an indenture trustee like Law
24 Debenture, a fiduciary to all of its holders, in an
25 impossible position where it is to serve the holders, but it

1 must submit to the demands of the debtor to settle. Debtor's
2 objection is contrary to the plan. It's contrary to
3 representations it's made to this Court between counsel and
4 to the public in general. It is contrary to how it's treated
5 every other indenture trustee in this case, and it's contrary
6 to the order confirming their plan. The plan provided quite
7 clearly in § 1518 that the debtor shall pay on the effective
8 date all the fees and expenses of an indenture trustee in
9 cash and in full. That's a typical provision in a Chapter 11
10 case in which there are indenture trustees and that type of
11 indebtedness involved. Basically, the holders get two
12 bundles of consideration for the plan, a distribution
13 directly to them and a payment of fees of their indenture
14 trustee so that it does not have to invoke the charging lien
15 and, therefore, reduce the recovery to those holders. That
16 was the consideration that this debtor offered to and
17 solicited votes from the Quips and the Toppers and the senior
18 notes, and this Court should hold them to that promise. The
19 fairness of the plan was built into the concept that the
20 Toppers and the Quips were going to be treated the same, that
21 their distribution would be a percentage recovery that was
22 equal. That was critical to Judge Case's finding in the
23 confirmation that they would be treated alike. Now, with
24 respect to that, the debtor at confirmation and also in the
25 confirmation order said that both the 8-A and 8-B parties

1 would be treated alike, that their distribution would be the
2 same. However, by objecting to our fees and causing us to
3 rely on the charging lien, they have significantly reduced
4 the recovery of the Quips to far less than any recovery the
5 Toppers will receive.

6 THE COURT: Is that because you'll have to go to
7 the Quip holders and recover under your charging lien?

8 MR. SNELLINGS: Yes, Your Honor. And for anything
9 that you do not allow here under this particular order. So,
10 with respect to when we filed our request pursuant to the
11 plan, just before going effective, of what our fees were, the
12 response to the debtor was that they had never any intention
13 to paying our fees. Once if you look at the correspondence
14 between debtor's counsel and my office, you will see that we
15 challenged that and said, Gee, that's not what you said
16 during the confirmation process. That is not what you said
17 in the plan, and it would have been good to disclose the fact
18 that you were never going to agree to our fees, challenge
19 them, and, therefore, reduce the ultimate recovery to the
20 Quips. At that time, the attitude of the debtor changed and
21 said, No, we will comply with the plan, but you're still
22 going to have to file a fee application and go through that
23 process. They also made representations to counsel, Your
24 Honor. During the period just prior to going effective we
25 had the issue of determining an amount and estimating the

1 amount for the adversary proceeding in the Class 9 claims
2 dispute reserve. We had numerous discussions about trying to
3 set that amount and at that time, we had discussions with
4 counsel from the debtor regarding our fees because that was
5 just prior to going effective, and we were preparing to make
6 our presentation to the fees as required under the plan. And
7 as stated in the affidavits that we put forward to the Court,
8 is that we had conversations that the debtor did intend to
9 pay our fees and that we would not be nickeled and dimed.
10 However, once we actually made the application on November
11 1st, that changed and required us to invoke the charging
12 lien. Also prior to going effective on November 1, the
13 debtor on its own website published a notice to all indenture
14 trustees, including Law Debenture, that is open to the public
15 and any Quips holders, any Toppers holder in which they
16 stated that on the effective date all of the fees and
17 expenses of all indenture trustees including law debenture
18 would be paid. But contrary to that public representation,
19 it's never been paid. This is completely inconsistent with
20 how they've treated all of the other indenture trustees in
21 the case. Take for instance, Wilmington and its major holder
22 Harbert. They struck a deal prior to confirmation and it's
23 in the plan that they were paid on the effective date \$2.25
24 million in cash for their fees. Wilmington also invoked
25 their charging lien and received another amount of stock

1 worth in the amount of around 55,000 shares which at current
2 prices is over another million dollars. So they have
3 collected, Wilmington and Harbert, in excess of \$3 million to
4 cover their fees. Unlike Wilmington and Harbert, our fee
5 application is solely for the fees and expenses associated
6 with Law Debenture's role in this case. We are not seeking
7 any fees of Magten's. You can sort of parallel, Harbert was
8 the Topper's largest holder; Magten is ours. Both have taken
9 very aggressive positions throughout this case. However,
10 unlike Wilmington and Harbert, we're not seeking the payment
11 of any of Magten's fees here with this application. It's
12 solely Law Debenture's. But they struck their deal and
13 that's what they were paid. There was absolutely no review
14 of Wilmington and Harbert's fees and expenses by the debtor
15 in the testimony provided to you when we took a 30(b)(6)
16 deposition of a representative from the debtor regarding
17 their fees and expenses and all fees and expenses of
18 indenture trustees. The testimony was that the amount was
19 struck during the negotiations between Harbert and the
20 Committee but there was absolutely no oversight, no review of
21 any of the fees and expenses of the indenture trustee.
22 Second, there's HSBC. They're the indenture trustee to the
23 senior note holders. Your Honor, they've been paid over
24 \$700,000 in fees and expenses. There again, there was no
25 oversight. The representative of the debtor did indicate

1 that he had seen the invoices, but that he did not give them
2 anything but a quick review, and that they paid all of those
3 expenses of HSBC and their counsel, Pryor Cashman, a hundred
4 cents on the dollar, and this review can best be seen by
5 looking at Pryor Cashman's first invoice in which there is a
6 double entry for work done on the very first day of them
7 being hired. I asked the debtor, Did you pay for that double
8 entry? And they said, Most likely, yes, since we paid for
9 everything. Finally, Your Honor, there was our predecessor
10 indenture trustee, Bank of New York. They were the indenture
11 trustee for the Quips prior to our successor. They had
12 submitted fees and expenses of \$54,000 not only during the
13 time of their position on the Committee but also pre-petition
14 fees and expenses. The debtor paid those expenses on the
15 effective date without any review, without any oversight.
16 Yet, now they're trying to hold us to a standard of
17 substantial contribution when here was a predecessor trustee
18 who was only on the case for a short time and was paid not
19 only their post-petition fees and expenses but also their
20 pre-petition. With regard to that, with regard to the
21 representations made, with the findings of the Court in the
22 confirmation order, and with the acts of the debtor we
23 believe that they're judicially estopped from now just doing
24 a blanket objection to our fees and requiring us to come
25 forward to the Court with this fee application. I think also

1 in their objection they minimize what we have done in this
2 case. All that Law Debenture's done is attempted in good
3 faith to fulfill their fiduciary obligations to their
4 holders. They have performed customary acts of indenture
5 trustees in Chapter 11s that are customarily paid by the
6 debtor. We are the class representative. We represent
7 hundreds of holders of Quips, and we perform that service
8 diligently and for the benefit of the debtor who does not
9 have to deal with these thousands of creditors and debt
10 holders. We served on the Creditors Committee, a normal and
11 customary act. We filed a proof of claim so that the debtor
12 could only have to deal with one proof of claim rather than
13 thousands. We worked with regard to plan confirmation. Now,
14 the plan isn't to our liking, yet it is better now as
15 confirmed than it was when we started. The first plan had a
16 death trap provision, that if a class did not vote for the
17 plan the entire class got nothing. We fought that. It was
18 taken out. We also believe that while they do not recognize
19 it to the full extent that we would want it, that the plan
20 now recognizes the fact of the litigation and the legitimacy
21 of that litigation and it continues as part of the plan. We
22 also worked with the debtor with regard to solicitation and
23 the issues that were going to arise with regard to splitting
24 the class. Now, with regard to Option 1 and Option 2. While
25 they did not take our warnings and did not put in

1 solicitation practices to resolve the identity problems we've
2 worked with them since to help resolve that. So we've
3 continued to work with the debtor on the litigation. And
4 then we have the litigation itself, Your Honor. We're in the
5 litigation for good. The way the plan is devised so no Quips
6 holders have to be plaintiffs in this litigation so long as
7 we're a part of the litigation. Section 12 of the
8 confirmation order is quite explicit. While in other classes
9 the indenture is canceled and is not in full force and
10 effect, with regard to those who took Option 2, we are still
11 obligated to be representing them as a class and continue to
12 do so. The litigation was an integral part of the plan
13 because it's the sole recovery of a substantial number of the
14 Quips who chose that, and it was the dividing of that choice
15 between Option 1 and Option 2 that Judge Case would allow
16 confirmation of the plan. So, with regard to those who took
17 Option 2, the Quips notes and all the related documents
18 remain in full force and effect, and we continue to fulfill
19 that role as the indenture trustee, and that is worked into
20 the confirmation order. And we will continue to fulfill
21 those responsibilities. There are a number of methods that
22 we think we can be paid here. We believe the clearest one is
23 the plan itself, and 518 that all indenture trustees are paid
24 their fees and expenses at or on the effective date in full
25 and in cash. Now it states that if the debtor and the

1 indenture trustee do not agree, then it has to come before
2 the Court. However, I believe and as we stated in our reply
3 that that type of objection should have the specificity with
4 regard to what items they truly reject, that a blanket
5 rejection without any specificity is one done in bad faith
6 and is arbitrary and is very difficult as counsel for an
7 indenture trustee to respond to. To date, if you parse
8 together all their correspondence and pleadings, the debtor
9 has admitted or at least suggested that they're in agreement
10 with four of our categories and that they don't have a real
11 objection to it. But yet, they hide behind the fact that
12 they will need a order to pay that. They don't need an
13 order, Your Honor. The order's in the confirmation. If they
14 agree with our fees, they pay it, yet they haven't paid it.
15 They have strung this out to such an extent that we are still
16 accruing significant fees and expenses. They raise an issue
17 with regard to our local counsel. Our local counsel
18 submitted fifteen pages of invoices, a very small amount
19 given all the fee applications that have been filed here.
20 There's nothing unusual with regard to what our local counsel
21 did. There's absolutely no grounds to object to their fees.
22 Everyone knows that here local counsel is Delaware's cottage
23 industry, and everyone knows what they perform and the
24 activities that they do, and there's absolutely no reason to
25 ask for more information about what they've done in this

1 case. That's quite apparent. With regard to the fees of Law
2 Debenture, the two officers that have been responsible for
3 this case, they ask for further information. Yet, the detail
4 that is given, both in our application, is significant and
5 far greater than any information that they received from HSBC
6 and certainly far greater than anything they've received from
7 Wilmington since Wilmington never turned in a fee app. And
8 yet they ask for more. Your Honor, it's time to relieve us
9 of the burden of this leverage, to level the playing ground,
10 and allowing us to move forward in the litigation and any
11 settlement without using our fees as a ping-pong and without
12 using our fees as leverage to gain settlement.

13 THE COURT: Is it your position that, and as I read
14 the fee request, they continue all the way through October
15 basically to the plan confirmation; correct?

16 MR. SNELLINGS: Correct.

17 THE COURT: And so from that point on when the
18 appeal was filed by Law Debenture and Magten trying to upset
19 the plan, you make no charges for those services.

20 MR. SNELLINGS: Well, I'd have to check exactly
21 when we stopped. I think that under the plan it was up to
22 the effective date, which was November 1.

23 THE COURT: I want to separate something right
24 here. It seems to me that what you do for your -- basically
25 your clients, the Quip holders, as I understand this thing,

1 the way it started out this 1996 debenture was originated to
2 raise some financing money for environmental matters and then
3 City Bank was the trustee, City Bank of New York, and was the
4 indenture trustee and you succeeded to their interest post-
5 petition.

6 MR. SNELLINGS: That's correct. Because Bank of
7 New York had a conflict.

8 THE COURT: And during that pre-petition period
9 then City Bank would receive the funds from the old Montana
10 Power Company and then they make the distribution to the Quip
11 holders for the principal and interest that were paid, and
12 then they received an annual fee; right?

13 MR. SNELLINGS: That's correct.

14 THE COURT: Okay. Now, did that debenture trustee
15 or your company as the successor trustee ever attempt to
16 protect those Quip bondholders when it learned back in '99
17 that the cash cow was going to be dismembered and that the
18 financial integrity of these Quip bonds were in jeopardy?

19 MR. SNELLINGS: Well, Your Honor, I think you go to
20 some of the very essence of the fraudulent conveyance and the
21 fact that we believe that the entire going-flat transaction
22 was part of a fraudulent scheme that began --

23 THE COURT: No, I'm talking about, counsel, much
24 more than that. I'm talking about the dismemberment of a
25 generation facilities, which came first --

1 MR. SNELLINGS: Uh-huh.

2 THE COURT: -- the selling of all the generation
3 facilities to PP&L and then the dismemberment of the gas
4 supply company, and then came the transmission sale, each one
5 of these separate, and what I can't understand is how the
6 Quips bondholders were protected, weren't trying to be
7 protected at the beginning of this corporate scheme.

8 MR. SNELLINGS: That I have no knowledge of.

9 THE COURT: But you're a successor in interest.

10 MR. SNELLINGS: That's correct.

11 THE COURT: See, what bothers me about this whole
12 thing is these Quip holders and the indenture trustee is they
13 didn't step in any time when this thing was on the drawing
14 boards to be split out and all this cash was going to go into
15 this telecommunications network and put a lot of money in the
16 ground. No one stepped forward on behalf of these Quip
17 bondholders to try to stop that.

18 MR. SNELLINGS: You know, again, I'm not privy of
19 the history there pre-petition. All I know is that once Law
20 Debenture, you know, became the successor, we did review the
21 going-flat transaction and had certainly tried to step in and
22 protect the rights of the Quip holders with regard to that
23 transaction.

24 THE COURT: I'm probably holding you to the wrong
25 standard but it's just -- There's no question that the Quip

1 notes were unsecured.

2 MR. SNELLINGS: Uh-huh.

3 THE COURT: What they were relying upon was the
4 financial integrity of the Montana Power Company, which had a
5 history of performance for Montana.

6 MR. SNELLINGS: That's correct, and --

7 THE COURT: And that all changed when the company
8 decided to go into a dismemberment plan, and they did, and
9 nobody stepped forward on behalf of the Quip holders and
10 said, Hold it. Nobody sought legal action at that time and
11 says, We relied upon the financial integrity of this company,
12 of the going concern, all the generations through
13 transmission.

14 MR. SNELLINGS: Your Honor, I appreciate that
15 history. All I can do is talk about when we got involved --

16 THE COURT: Now, let's get involved with you. You
17 say none of these fees are with regard to the Magten going-
18 flat transaction.

19 MR. SNELLINGS: No, I'm not --

20 THE COURT: Because that's not the way I read the
21 application.

22 MR. SNELLINGS: No, we're not making any
23 application for any of Magten's fees that they've incurred in
24 this case. For example the fees of Fried Frank or any other
25 counsel that they might.

1 THE COURT: But your company parroted the Magten
2 and asserted the Magten objections to the plan and asserted
3 the fraud throughout the confirmation process; correct?

4 MR. SNELLINGS: We -- Yes, but there are certain
5 things that we've never joined them. We continued to
6 exercise independent judgment. For example, we've never
7 challenged the MOU, and that's one appeal. We did not join
8 in the Paul Hastings conflict motion. We did not join there.
9 We do not join in the appeal of the confirmation order, Your
10 Honor. That's just Magten. So there were definite times
11 throughout that we did not join with them, and they went off
12 on their own way.

13 THE COURT: So the only thing that you've got going
14 now adverse to the reorganized debtor is the Magten/Law
15 Debenture lawsuit trying to upset the Clark Fork transfer.

16 MR. SNELLINGS: That's correct and also the more
17 recent one that was filed about Friday a week ago in which
18 we're seeking to revoke the confirmation order for their
19 failure to adequately fund their Class 9 reserves.

20 THE COURT: Then this provision in the plan
21 relative to a dual test for your company's award of the fee,
22 503 --

23 MR. SNELLINGS: Uh-huh.

24 THE COURT: -- substantial contribution, and
25 something else; right?

1 MR. SNELLINGS: Well, Your Honor, I think the way
2 the plan reads is that it's subject to 503 and the debenture,
3 and the language in the debenture states at 907 that we are
4 -- that the debtor's obligated to pay our reasonable fees and
5 not only is it a reasonable fees but it's also an
6 administrative expense.

7 THE COURT: Well, doesn't that interpretation write
8 out, blank write out 503 language?

9 MR. SNELLINGS: Write it out?

10 THE COURT: You just argued that you don't have to
11 even get into this substantial contribution bogey-man
12 argument because it's irrelevant.

13 MR. SNELLINGS: Well, I think it is by the fact
14 that they have not in any way applied that same standard to
15 any other indenture trustee, that they're only using that
16 standard and rejecting our fees outright as a punishment for
17 our actions in this case in which we were trying to protect
18 the interest of the Quips.

19 THE COURT: Maybe they were satisfied with the
20 cooperation they received from those other indenture trustees
21 and they felt that it wasn't necessary to invoke 503(b).

22 MR. SNELLINGS: Well, Your Honor, they have said
23 that, that the issue with regard to the Toppers was that they
24 settled and they now get \$2.5 million in cash without any
25 oversight. The problem there is that, Your Honor, with

1 regard to that settlement we were never invited to that
2 table. We were never invited, you know, when they negotiated
3 with the Toppers they didn't invite the Quips to see if we
4 could come to some global settlement. Instead, they
5 completed tried to isolate us. There have been other
6 parties, Your Honor, throughout this case that have brought
7 up the fraudulent conveyance action. The McGreevey's class
8 action that was mentioned earlier and the Comanche creditor
9 as well as Atlantic Richfield. Creditors of Clark Fork and
10 Black Foot have been bringing up the fraudulent conveyance
11 action on a number of occasions, and in each case, even when
12 some of those have indicated an interest in joining our
13 action, the debtor has worked very, very diligently to settle
14 those cases and get those people not to join our action, and
15 consequently -- but that's not the standard that I believe
16 that, you know, we should be held to. We have provided a
17 service to our Quips. The indenture is clear that the debtor
18 is obligated, and you can either put it under an
19 administrative claim or you can look at the indenture as an
20 executory contract that has been assumed and continues to be
21 in effect today even. It was in effect with the debtor in
22 possession. It's in effect with this reorganized debtor, and
23 as an executory contract, they're obligated to pay for the
24 services that we have been providing. So there's a number of
25 ways in which we should be paid. This one in which they

1 promised under the plan to pay indenture trustees so that our
2 holders would not be significantly deluded by the charging
3 lien is the one that has brought us here today, and we
4 believe, based on their representations, based on the
5 confirmation order, and based on their public representations
6 that they're obligated to pay those fees, pay them in full,
7 and not apply this standard that they're only using more as a
8 club rather than anything else.

9 THE COURT: My other question was regard to the
10 invoice that I have seen in here relative to the annual
11 administration fee of 45,000 is also included the
12 transactional or extraordinary fee of 129,000.

13 MR. SNELLINGS: That's the hourly fees of the two
14 officers of Law Debenture that's been focused on this case,
15 and that's broken out, Your Honor, in pretty explicit detail
16 and in time records in our application.

17 THE COURT: I agree that the time records are
18 there, but what is the basis, the legal basis for those
19 people to be paid through the reorganization?

20 MR. SNELLINGS: It is pursuant to the indenture,
21 they're allowed to charge an hourly fee, just like --

22 THE COURT: Reasonable expense?

23 MR. SNELLINGS: -- HSBC did and HSBC's fees were in
24 excess of \$400 an hour and Law Debenture's officials are, I
25 believe, 325.

1 THE COURT: Okay, anything further?

2 MR. SNELLINGS: No, Your Honor.

3 THE COURT: All right. Mr. Austin.

4 MR. AUSTIN: For the record, Your Honor, I'm Jesse
5 Austin from Paul Hastings on behalf of Northwestern. I want
6 to make a couple of summary points and try to address a
7 couple of the questions. First off, I think the Court's
8 analysis or perspective is correct that whatever else may be
9 in the Quips indenture, 503(b) under the Bankruptcy Code
10 ultimately controls whether or not the debtor, in this case
11 Northwestern, actually has to pay cash with respect to the
12 indenture trustee's fees and costs incurred by Law Debenture.
13 What they're here asking you for today is to require
14 Northwestern to pay approximately a million dollars in cash
15 to them -- to it for the fees and expenses incurred in so-
16 called fulfilling its duties as indenture trustee which Mr.
17 Snellings readily admitted was primarily to benefit the
18 individual Quips holders. We're not here arguing and in fact
19 that they don't have a claim. We're here arguing whether or
20 not with respect to whatever claim is there, whether
21 Northwestern has to pay it in cash. We submit in this
22 particular instance, 503(b) controls, it specifically
23 provides for in the plan. To the extent ultimately, this
24 Court, for example, would say, Okay, you made a application
25 for a \$1,100,000 effectively, I'm going to grant you a

1 hundred thousand. That other million dollars of the claim
2 doesn't go away. It becomes part of the indenture -- Law
3 Debenture's claim as the indenture trustee on behalf of the
4 Quips, and if they ultimately prevail in the litigation would
5 become part of that prevailing litigation claim. It doesn't
6 go away. It becomes a Class 9 claim ultimately paid from
7 distributions and Class 9 reserve. So I want it to be clear.
8 It's not that the claim is going to go away. The real
9 question is whether or not Northwestern has to bear the brunt
10 of a cash payment. Here, Your Honor, the one thing I believe
11 we do agree with is that § 518 of the plan controls. But
12 unfortunately Mr. Snellings only reads the first clause of
13 that first sentence of § 518 which says, On the effective
14 date the reorganized debtor will pay the indenture trustee's
15 fees and expenses in full and in cash. What Mr. Snellings
16 does not go on to read is, In a amount to be agreed upon
17 among the debtor and each of the indenture trustees. Each of
18 the indenture trustee means HSBC, Bank of New York,
19 Wilmington Trust, as well as Law Debenture. In the event
20 that the trustee and the debtor can't agree, then the issue
21 comes before this Court to apply § 503, and 503 is very clear
22 that for an indenture trustee, which admittedly in this
23 particular instance, represents an unsecured claimant to
24 receive a cash payment on account of its fees, it has the
25 burden of establishing a substantial contribution. And the

1 law in this case, which is controlled by the decision of
2 Lebraun (phonetical) vs. Mecom (phonetical) Financial at 27
3 F3d 937, clearly points out that a substantial contribution
4 shows that the efforts of the applicant, in this case Law
5 Debenture, resulted in a actual and demonstrable benefit to
6 the debtor's estate and the debtor's creditors. Otherwise,
7 the creditors presume to be acting on it or its
8 representative's behalf. And the Lebraun court further
9 stated that 503(b) is to encourage activities that will
10 benefit the estate as a whole and the substantial
11 contribution should be applied in a manner that excludes
12 reimbursement in connection with activities of creditors and
13 other interested parties which were designed primarily to
14 serve their own interest in which accordingly would have been
15 undertaken absent an expectation of reimbursement from the
16 estate. Controlling law as well as 503(b) says here, Your
17 Honor, that the burden's on Law Debenture, and we submit that
18 it has not shown and cannot show that the fees and costs of
19 which it seeks payments were from efforts for Law Debenture
20 and its counsel provided an actual and demonstrative benefit
21 to Northwestern and its estate and its creditors. Indeed, if
22 the Court reviews not only the application itself, but if it
23 reviews many pleadings that have been filed in this case, it
24 is very clear that Law Debenture acted almost exclusively to
25 protect the interests of the Quips holders and especially

1 Magten and not other creditors of Northwestern's estate. Law
2 Debenture essentially became the official mouthpiece for
3 Magten and other distress funds for the Quips. Magten held
4 in excess of 25 percent of the Quips, and under the terms of
5 the indenture could direct Law Debenture to take actions in
6 the bankruptcy case, and for the most part, while Mr.
7 Snellings in part begs to differ, Law Debenture appears to
8 follow Magten's lead rather than the interest of those Quips
9 holders which actually voted for the debtor's plan. Law
10 Debenture objected to the confirmation. Law Debenture filed
11 the adversary case. It never engaged in negotiations to
12 result in a consensual plan. It did not send out any type of
13 consent solicitation letter urging the Quips holders to vote
14 in favor of the plan. There's nothing that Law Debenture
15 really did here as a practical matter which in any way
16 benefitted and enhanced this company getting the plan
17 confirmed, and in fact, all along the way, while we obviously
18 opposed what they were doing, they were throwing up
19 roadblocks and objections to the confirmation process. When
20 you boil it down, Law Debenture's arguments essentially jell
21 around one point. Northwestern paid the other trustees, it
22 should pay us too. But as this Court itself recognized in
23 its comments, Northwestern clearly sees the other indenture
24 trustees significantly different than Law Debenture.
25 Throughout the Chapter 11 case, as we noted, Law Debenture

1 was fighting the process, and indeed, once it filed the
2 adversary case, it got booted off the Creditors Committee.
3 So, certainly after May 14th, anything Law Debenture was
4 doing May 14th, 2004 can't be said it on the benefit of the
5 estate but solely for the benefit of the Quips holders in
6 trying to block confirmation. In contrast, HSBC, as a
7 trustee for the senior unsecured notes, worked throughout the
8 case as a member of the Creditors Committee to develop a
9 consensual plan. And it had to defend itself against attacks
10 raised by Law Debenture as well as preliminarily Harbert and
11 Magten concerning -- Harbert and Wilmington Trust concerning
12 whether or not the claims of the Class 7 senior unsecured
13 notes were in fact a valid claim under some argument that the
14 Public Utility Holding Company Act may have voided those
15 securities. Throughout there were negotiations and
16 discussion with HSBC, and the Creditors Committee would
17 ultimately reach an agreement to pay the claim presented by
18 HSBC because HSBC from the debtor's perspective, from the
19 perspective of the Creditors Committee did indeed make a
20 contribution, and to the extent that they were helpful, and
21 they were, they supported confirmation. They urged their
22 holders upon call to support and vote for the plan. From
23 that standpoint HSBC is clearly different, and I might add,
24 Your Honor, in contrast and I'll come to it in detail in a
25 second, the payment to HSBC was for -- and it represented

1 approximately almost \$800 million of senior unsecured claims,
2 it's claim was for \$745,000 roughly and that was for the
3 period from September 15th all the way through the
4 confirmation. What you have to do is compare the claim of
5 Law Debenture, which is over a million dollars, representing
6 \$65-plus million of claims, if you want to get some level of
7 comparison. Additionally, the same can be said as far as the
8 assistance of Wilmington Trust, the trustee for the Toppers.
9 Yes, Wilmington Trust did engage in litigation with the
10 debtor in trying to oppose confirmation of the plan. Yes, it
11 had Harbert beside it when that litigation was going on, but
12 that was at the time that we had a plan that distributed only
13 2 percent of the company's new equity to the Toppers and the
14 Quips to be shared pro rata. As a result of the litigation,
15 as a result of negotiations within which Wilmington Trust
16 entered into with the debtor and with the Creditors
17 Committee, a modification to the plan was made that increased
18 the distribution to the Toppers and the Quips on a pro rata
19 basis from 2 percent to 8 percent with additional warrants
20 that could be exercised for an additional 5 percent of the
21 company. So as a result of direct efforts by Wilmington
22 Trust and Harbert, there was a benefit to the debtor's estate
23 because these other creditors, which the Quips could have
24 taken, all they had to do was vote for the plan because they
25 went along for the ride, if you will. Wilmington Trust made

1 from our perspective a substantial contribution, but it's not
2 completely substantial because we didn't pay all of the fees.
3 As a result of the negotiations, we only paid \$2.25 million,
4 and we want to make it clear, based on that payment, that
5 every creditor thought that was okay. It was actually
6 imbedded in § 5.18 that those payments were being made to
7 Wilmington Trust on account of its position and Harbert on
8 the settlement. And, as Mr. Snellings stated, Wilmington
9 Trust didn't get paid a hundred percent because it did indeed
10 exercise its charging lien that reduced the distribution to
11 the Toppers by approximately a million dollars in value. So
12 there was another million dollars of claims that Wilmington
13 Trust, through the provisions of the plan, got paid some cash
14 because we saw that made a contribution but on the balance of
15 it had to get paid through its charging lien, which
16 effectively then reduced the distribution to the holders of
17 the Toppers' claims. With respect to Bank of New York,
18 similarly situated, that was done as a result of some of the
19 work done at the beginning of the case. Plus, Your Honor,
20 with respect to the pre-petition amount, my recollection I
21 can state in my place, is I believe that was for payment on
22 account of unpaid trustee fees to the Bank of New York on
23 account of its position as the indenture trustee for one of
24 the senior secured bonds. The reason Bank of New York had to
25 resign as indenture trustee on the Quips was because Bank of

1 New York also served as indenture trustee on one of the
2 issues of the senior secured bonds and under the Trust
3 Indenture Act of 1940, it couldn't serve in both capacities.
4 It resigned as a holder, as a trustee for the Quips and
5 that's where that, I think, most of that pre-petition amount
6 came from. The point is, Your Honor, that here we did indeed
7 treat the Toppers and the Quips alike, and irrespective of
8 the fact that Law Debenture may attempt to invoke a charging
9 lien, it's ultimately provided for under the indenture just
10 as under the indenture there's obligations for
11 indemnification from those holders of Quips that are
12 directing Law Debenture to take such action that may
13 otherwise it has taken in this case. Here, Your Honor, we
14 don't see any basis that Law Debenture can argue that it's
15 made a substantial contribution to confirming the debtor's
16 plan. It totally failed to carry its burden and at all
17 points to this case it has attempted to oppose confirmation
18 and closing of this estate. As we have gone through in an
19 attempt to review Law Debenture's fee applications, we do
20 note a number of things. First, whatever else may be before
21 the Court, there certainly should be no consideration
22 whatsoever for fees and expenses incurred by Law Debenture
23 after May 14th because clearly that's a defining moment when
24 Law Debenture was removed from the Committee as a result of
25 the fact it actually joined in filing the adversary case to

1 remove assets from the debtor's estate which would have been
2 to the detriment of all the debtor's creditors. So whatever
3 work was incurred after May 14th clearly doesn't fall into a
4 situation where this debtor would have even thought to have
5 paid in cash but one where Law Debenture can ask this Court
6 in good conscience to pay in cash. If you then just look at
7 this fee statement up to that point, that otherwise reduces
8 that million one down to about \$400,000, and the unfortunate
9 thing, Your Honor, in reviewing the application that's
10 presented, we the debtor can't really discern how much of
11 that should or should not be allowed as to things that may
12 well have helped the debtor. For example, doing some
13 communications with the Quips holders and how much of it is
14 just stuff that otherwise would have been incurred by Law
15 Debenture under any circumstance. The one thing I can tell
16 you that we've been able to discern was there's approximately
17 \$67,000 incurred for participation on the Creditors Committee
18 and related matters. To that point, I can advise the Court
19 the debtor would not object to those payments. However,
20 you've got to then look at the rest of the claim they filed
21 in this context. For example, a review and analysis of
22 general bankruptcy matters, they identify approximately
23 \$88,000. And there they specifically assert that these
24 tactics are attempted to facilitate efficient, quote,
25 "preservation and administration of the rights and claims

1 under the indenture." Well, if that's what they incurred,
2 they have a Class 9 claim, but it's not one that we should
3 pay the cash for under 503(b) at this point. They have
4 another \$32,000 incurred for preparation of proofs of claim
5 although that section only includes approximately 2.1 hours
6 of time. Again, that's something that may be reimbursable
7 under the indenture, but not a 503(b) type reimbursement.
8 The same for certain communications with Quips holders in the
9 amount of \$65,000 of which when you look at some detail, they
10 put in time related from June 15th to September 3rd, 2004,
11 related to the adversary proceeding including 5.5 hours
12 related to research and the trustee's duties to prior
13 bondholders in the fraudulent conveyance claim. And then
14 separately, Your Honor, they have included in that \$114,511
15 of bankruptcy litigation fees and expenses related primarily
16 to the adversary proceeding and also another \$452,000 roughly
17 for plan and disclosure statement matters, clearly places
18 where Northwestern cannot see that it gained any benefit for
19 the fees and expenses incurred. One last point, Your Honor,
20 the argument that the indenture has been assumed is
21 incorrect. The plan explicitly says and the indentures are
22 extinguished in counsel, but irrespective, indentures
23 themselves have survival language with respect to ultimate
24 payment of administrative costs and other claims. These
25 payment provisions may well survive the ultimate cancellation

1 and termination of the indentures. They certainly may well
2 survive to the extent that we have ongoing litigation and if
3 the unlikely circumstance from Northwestern's perspective
4 that Law Debenture and Magten would prevail on the underlying
5 adversary complaint, that is the basis by which they may well
6 then be able to argue -- at least Law Debenture could argue
7 since it is the Quips' representative, that it is entitled to
8 its fees and expenses as a prevailing litigant under the
9 contractual provision. At this point, Your Honor, we ask
10 that this Court deny the request of Law Debenture to require
11 the debtor to make a cash payment on account of fees set
12 forth in the application. We do not believe that the plan
13 allows for such payment. The parties did not agree on the
14 amount. The plan specifically provides that as a result,
15 there has to be an application under 503(b), and in that
16 context, Your Honor, there's been no showing in this
17 particular instance of a substantial contribution for the
18 fees and expenses requested. Thank you.

19 THE COURT: Does the Committee have any position?
20 Let me hear from the Committee.

21 MS. PHILLIPS: We would support the debtor's
22 objection. For the record, Margaret Phillips of Paul Weiss
23 Rifkind Wharton & Garrison for the Plan Committee. The
24 language in the plan in 5.18 is very clear, and that to the
25 extent there's a dispute between an indenture trustee and the

1 debtor that the mechanism provided is that they file an
2 application in front of this Court subject to 503(b), and in
3 looking at their application, it just doesn't seem to satisfy
4 that standard which is a pretty stringent standard. Thank
5 you.

6 THE COURT: All right.

7 MR. SNELLINGS: Your Honor, just to make sure that
8 we're all reading the same passage, I believe that 518 says
9 503 and not 503(b) as well as the indenture, and with regard
10 to, you know, administrative expenses, the indenture again
11 requires that the debtor be obligated to pay us all of our
12 reasonable fees and expenses as well as giving us an
13 administrative expense, but 518 does not make a reference to
14 503(b). Again, with regard to the plain language of the
15 plan, it also states that if the parties cannot reach an
16 agreement. Here we have again the debtor indicating certain
17 portions of the fee request being reasonable and such, yet
18 opposing the entire thing in toto. I don't believe that
19 that's what's demanded of the plan and that those amounts
20 that they have admitted are reasonable and if they don't have
21 an objection, they should be required to pay. And, with
22 regard to the remaining portion of the claim, while it gives
23 some comfort to the fact that it continues to be a Class 9
24 claim, with regard to that I guess it goes back to the
25 issuance of the fact that whether or not it has been properly

1 reserved under the disputed reserve amounts, and whether it
2 will be there to pay that claim should we prevail in the
3 litigation, and given the representations to the Court in
4 prior hearings, one has to wonder how much the debtor will be
5 able to rely on their dispute reserve in the future. But, we
6 believe that our application is consistent with our duties
7 and responsibilities as an indenture trustee in this case and
8 consistent with what we are to be doing in the sense that we
9 are a fiduciary representing the Quips. With regard to our
10 comparison to HSBC, let's be serious about that. They were a
11 member of the Committee. They had all the privileges of
12 Committee's counsel and such, and I would assume, since
13 they've gotten paid almost a hundred cents on the dollar,
14 that I am surprised that the Committee and the debtor paid
15 them \$700,000 when in fact the senior notes had very little
16 risk in this bankruptcy, and yet, they have incurred that
17 type of fees when they were sitting on the Committee and
18 pretty much as was described going along with the bankruptcy.
19 With regard to Wilmington, we know that, again, out of that
20 \$2.25 million, 1.9 was paid directly to Wilmington, 300,000
21 to Harbert, and we assume, although it's never been disclosed
22 that the additional stock also went to cover Harbert's fees
23 and expenses. They were aggressive in this case, and just to
24 point that they had settled when we haven't even though we
25 have tried desperately, and this Court is well aware of us

1 attempting to bring a settlement of our litigation and all
2 the other resulting litigation before this Court that most of
3 those fees went to be paying Harbert's costs, we're not
4 seeking Magten's costs here which goes to the reasonableness
5 of what we're seeking here, and therefore, we believe that
6 our fee request should be allowed pursuant to the plan.

7 THE COURT: What about the argument that's made
8 that under any circumstances you shouldn't be paid any fees
9 after May 14th when you were relieved from the Committee and
10 took an adversary position?

11 MR. SNELLINGS: Well, Your Honor, you know, this is
12 an adversarial environment. We're in a Chapter 11 in which
13 people are constantly trying to make positions and such. The
14 Committee spent, what, \$50,000 researching whether or not
15 there was a fraudulent conveyance before Magten was even on
16 the Committee. This was a very serious issue, and to say
17 that once we have raised an objection or filed a complaint
18 that we have somehow forfeited all of our rights under the
19 indenture or under 503 or whatever standard, would be a
20 hammer that is contrary to the duties and responsibilities of
21 trust indentures and also it is, you know, contrary to the
22 fact that we are a representative fiduciary. We have no
23 stake in this. We do not hold Quips, but we do represent
24 Quip holders, and we are at all times acting in good faith.
25 That complaint has survived a motion to dismiss and once it's

1 properly teed up we'll move forward, and again, I remind the
2 Court that only eight weeks ago this debtor was willing to
3 pay us quite handsomely to settle that dispute and many
4 others, and we were willing to settle with that.

5 THE COURT: We don't have an agreement today.

6 MR. SNELLINGS: No, and remarkably while everybody
7 said how much they wanted to settle it, my phone hasn't been
8 ringing, so --

9 THE COURT: It's too bad we can't get somebody to
10 take it off track or get it back on track.

11 MR. SNELLINGS: Yes.

12 THE COURT: Well, thank you very much.

13 MR. SNELLINGS: Thank you.

14 MS. STEINGART: Your Honor, may I? There was a
15 point raised that I had not seen in the papers before that I
16 did want an opportunity to respond to since now we are --

17 THE COURT: What are you talking about? What
18 motion or what objection --

19 MS. STEINGART: I'm talking about Law Debenture.
20 Since there has been talk now that it should be a Class 9
21 claim and being a Class 9 claimant and having a substantial
22 Class 9 claim by virtue of the plan, all of -- I wanted to
23 point out the technical fact that all of Law Debenture's
24 fees, Your Honor, are post-petition. What Class 9 is for is
25 pre-petition, unsecured claims. So, the idea that somehow

1 Law Debenture's fees should be lobbed into Class 9 is
2 completely contrary to what the Class 9 claims were set aside
3 for, which is disputed, pre-petition, unsecured claims, and
4 before we went further with that, I thought it might be
5 helpful for the Court to be aware of that issue.

6 THE COURT: Mr. Austin, what -- Maybe you can
7 clarify your position with regard to not being -- you don't
8 want to pay any cash and does that mean that you want to pay
9 them in stock?

10 MR. AUSTIN: To the extent they ultimately had a
11 claim that derived from the litigation, Your Honor, then it
12 would be a Class 9 claim. I disagree with Ms. Steingart's
13 characterization that that is cost incurred on behalf of an
14 indenture that was entered into pre-petition and they're now
15 litigating that's what they were doing, so like any other
16 litigant that may have a contractual provision so that to the
17 extent they have a Class 9 claim, yes, they get paid in
18 stock. That's where it would come from, but the real issue
19 we're here today for, Your Honor, is the fact that the
20 administrative claim, the question is do they get paid? Do
21 we have to pay that claim in cash? The answer is, we
22 believe, not this particular one in the amounts they've asked
23 for. Thank you.

24 MS. DARWIN: Your Honor --

25 MR. AUSTIN: Your Honor, I object. Mr. Snellings

1 has already spoken on behalf of the indenture trustee, and
2 Ms. Darwin's with his firm. I think we only should have one
3 party to speak in connection.

4 MS. DARWIN: Your Honor, if I may, Amanda Darwin
5 with Nixon Peabody. I did actually want to agree with Mr.
6 Austin on this point.

7 MR. AUSTIN: I withdraw my objection.

8 MS. DARWIN: You will see that we have specifically
9 reserved our right to pursue an allowed unsecured claim for
10 that portion of the fees and expenses that aren't paid in
11 cash. We have filed two proofs of claims, as a matter of
12 fact, one on behalf of the Quip holders for principal and
13 interest due under the Quips, and that is the proof of claim
14 that has all the focus in terms of the adversary proceeding.
15 We have also filed a second proof of claim, which is our
16 standard practice for the fees and expenses of the indenture
17 trustee, and to the extent that those are not paid under
18 whatever theory, whether it be pursuant to the plan or
19 whether it be a substantial contribution in cash by the
20 debtor on the effective date, there is solid case law which
21 is undisputed that those fees and expenses post-petition are
22 an unsecured claim and payable by the debtor as an unsecured
23 claim. Thank you.

24 THE COURT: All right. Well, I'll take -- Is that
25 it? Everybody's got their briefs in, now they've got all

1 their arguments in -- just be a matter now to get a simple
2 order out.

3 UNIDENTIFIED SPEAKER: Simple?

4 THE COURT: Up or down. All right. I don't think
5 there's anything further; is there?

6 MS. DENNISTON: There's nothing further on the
7 agenda today, Your Honor.

8 THE COURT: Okay, then, we'll be adjourned.

9 ALL: Thank you, Your Honor.

10 (Whereupon at 2:20 p.m. the hearing in this matter
11 was concluded for this date.)
12
13
14
15
16
17

18 I, Elaine M. Ryan, approved transcriber for the
19 United States Courts, certify that the foregoing is a correct
20 transcript from the electronic sound recording of the
21 proceedings in the above-entitled matter.
22

23 Elaine M. Ryan
24 Elaine M. Ryan
25 2801 Faulkland Road
Wilmington, DE 19808
(302) 683-0221

5-09-05